IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE

FILED

February 28, 2000

Cecil Crowson, Jr.
Appellate Court Clerk

POLK COUNTY, TENNESSEE	)	E1999-01610-COA-R3-CV
	)	
Plaintiff/Appellee	)	Appeal as of Right From The
	)	POLK COUNTY CHANCERY COURT
v.	)	
	)	
GLENDA B. ROGERS, d/b/a	)	HON. JERRI SAUNDERS BRYANT
OCOEE RIVER RATS,	)	CHANCELLOR
	)	
Defendant/Appellant	)	

For the Appellant:
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For the Appellee:
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REVERSED
and REMANDED

Swiney, J.

O P I N I O N

Chapter Two of the Private Acts of 1981 authorizes Appellee Polk County to impose a privilege tax upon commercial Ocoee River whitewater rafting trips. Appellant Glenda Rogers, who owns Ocoee River Rats, an Ocoee whitewater rafting outfitter, did not pay the privilege tax on commercial rafting trips for the years 1988 through 1991. Polk County brought suit against her and the owner of another whitewater rafting company for collection of the taxes. The Trial Court dismissed the complaint against the co-defendant, finding that Polk County had no right under the Private Act to assess that business because it was located outside Polk County. The Court then rendered judgment against Rogers, whose business is located in Polk County, for the taxes due under the Act. In this appeal, Rogers challenges the constitutionality of the Private Act, which she

contends violates Article XI, Section 8 of the Constitution of Tennessee because it is "an unfair, unreasonable, arbitrary and capricious classification . . . not general in its application . . . [and] in contradiction of general law." She also contends the Act was repealed by implication with the adoption of T.C.A. § 67-6-330(9). For the reasons herein stated, we reverse the judgment of the Trial Court and remand the case to the Trial Court.

BACKGROUND

The facts in this case were stipulated by the parties. Appellant is one of 24 outfitters permitted by the Tennessee Valley Authority to operate commercial rafting businesses on the Ocoee River as it runs through Polk County, Tennessee. Twenty-two of the outfitters are located in Polk County and two are located outside Polk County. At the time this suit was filed, Chapter 2, Private Acts of 1981 provided, as pertinent:

> SECTION 2. The legislative body of Polk County is hereby authorized to levy a privilege tax upon the privilege of a consumer paying consideration for admission for an amusement. Such tax shall be imposed on the consideration charged by the operator at a rate equivalent to the combined rate imposed by the state and Polk County under the "Retailers' Tax Act" and the "1963 Local Option Revenue Act" pursuant to Tennessee Code Annotated, Title 67, Chapter 30, as the same may be amended and adopted. Such tax so imposed is a privilege tax upon the consumer enjoying the amusement, and is to be collected and distributed as provided in this act.

On January 20, 1993, Polk County brought this suit for unpaid amusement taxes against Glenda Rogers and Lamar Davis. Rogers' business is located in Polk County, but Davis' operation is in Bradley County. On April 8, 1996, the Trial Court dismissed Davis as a defendant on the following basis:

> In this above styled *Davis* case, this Court holds where the tickets were sold and collected in Bradley County, that Polk County has no right to make an assessment; consequently, there is no valid claim against Davis.

The Trial Court then rendered judgment against Appellant Rogers for the delinquent taxes.

Responding to this judicial pronouncement, Polk County caused the Legislature to enact Chapter 44, Private Acts of 1997, which amended the Private Act to delete the section of the statute which provided: "[t]he legislative body of Polk County is hereby authorized to levy a privilege tax upon the privilege of a consumer *paying consideration for admission* for an

amusement" and to substitute the following language:

> The Legislative Body of Polk County is hereby authorized to levy a privilege tax upon the privilege of a consumer *participating in an amusement* for which an admission fee is charged.

The parties agree that the reason the county sought this legislative amendment was to help ensure that the Polk County amusement tax would withstand further judicial scrutiny when assessed against all commercial Ocoee River whitewater rafting trips which pass through Polk County, regardless of where the ticket was sold or where the fee was collected. This case, however, was decided under the prior Private Act, the constitutionality of which Rogers contests in this appeal. The Attorney General of Tennessee was notified of this challenge to the constitutionality of a state statute and elected not to participate in this case because "a sufficient adversary relationship exists between Polk County and the defendants, Glenda Rogers and Lamar Davis, as operators of river rafting companies, to develop fully the issues surrounding this Private Act."

DISCUSSION

In evaluating the constitutionality of a statute, we must indulge every presumption and resolve every doubt in favor of constitutionality. *Petition of Burson*, 909 S.W.2d 768, 775 (Tenn. 1995). A statute comes to a court clothed in a presumption of constitutionality [since] the Legislature does not intentionally pass an unconstitutional act. Therefore, we begin out inquiry with the presumption that the statute in question passes constitutional muster. *Vogel v. Wells Fargo Guard Services*, 937 S.W.2d 856, 858 (Tenn. 1996).

One of Appellant's contentions is that Chapter 2, Private Acts of 1981 is "an arbitrary and capricious classification . . . not general in its application . . . [and] in contradiction of general law," in violation of Article 11, Section 8, Constitution of Tennessee.

Article XI, Section 8 of the Tennessee Constitution provides:

> **General laws only to be passed. -** The Legislature shall have no power to suspend any general law for the benefit of any particular individual, *nor pass any law for the benefit of individuals inconsistent with the general laws of the land;* nor pass any law

> granting to any individual or individuals, rights, privileges, immunities or exemptions other than such as may be, by the same law extended to any member of the community, who may be able to bring himself within the provisions of such law. [Emphasis Added]

The general law involving taxation of amusements in Tennessee is codified at T.C.A. § 67-6-212. That statute sets the State amusement tax at a rate "equal to the rate of tax levied on the sale of tangible personal property at retail. . . ."

A related general law, T.C.A. § 67-6-330 provides for specific exemptions:

(a) There is exempt from the sales tax upon admission, dues or fees imposed by § 67-6-212:

* * *

> (9) Events or activities conducted upon rivers and waterways in this state whose continued use for recreational purposes is contingent upon revenue produced pursuant to agreements entered into between the state of Tennessee and the federal government, or any agency thereof [i.e., TVA] . . ..

The parties stipulated that T.C.A. § 67-6-330(a)(9) gives statutory effect to a document entitled "Agreement Between State of Tennessee and Tennessee Valley Authority," dated March 16, 1984. That contract provides that an "outfitter fee" shall be established and a fee[1] shall be collected from each commercial whitewater rafting customer on T.V.A. waterways and paid into a trust fund. The proceeds of the trust fund are to be used by the State for the development, operation and maintenance of recreational easements for whitewater rafting granted to the State of Tennessee by TVA. The fee is assessed to all commercial whitewater rafting activities on T.V.A. waterways in Tennessee, and T.C.A. § 67-6-330 exempts those same activities from "sales tax upon admissions, dues or fees imposed by § 67-6-212."

Appellant argues that because Tennessee general law, T.C.A. § 67-6-330, prohibits the State from assessing an amusement sales tax on commercial whitewater rafting on T.V.A. waterways, the State is not constitutionally permitted to authorize Polk County to assess a privilege tax for that activity. Appellee argues that T.C.A. § 67-6-330 does not prohibit Tennessee from

[1] $2.00 for the first 8 years and subject to change thereafter.

taxing these trips, but rather prohibits Tennessee only from imposing a sales tax under T.C.A. § 67-6-212. We disagree with Appellee. It is our opinion that the Private Act in question is inconsistent with the general law of this state.

The tax imposed by Polk County subjects Polk County businesses and their customers in Polk County to a tax which the State itself could not charge. The Private Act in question subjects the Appellant, and also customers of Appellant, to a different and higher tax than is imposed on similar businesses in counties other than Polk County. In doing so, it suspends the general law for the benefit of Polk County. Such a suspension of the general law comports with Article XI, Section 8 of the Tennessee Constitution only if a reasonable basis exists for the classification. *Stalcup v. City of Gatlinburg,* 577 S.W. 2d 439, 441 (Tenn. 1978). This Court found such a reasonable basis to exist in *Throneberry Properties v. Allen,* 987 S.W.2d 37 (Tenn. Ct. App. 1998), in which we affirmed the assessment of the Rutherford County Development Tax. Our Supreme Court found a reasonable basis to exist in *Stalcup,* 577 S.W.2d at 442 (gross-receipts tax in Gatlinburg because of that city's unique tourist-oriented economic base.) The Supreme Court found no reasonable basis to exist in *Brentwood Liquors Corp. of Williamson County v. Fox,* 496 S.W.2d 454 (Tenn. 1973) (privilege tax on retail liquor dealers in Williamson County), and in *City of Tullahoma v. Bedford County,* 938 S.W.2d 408 (Tenn. 1997) (solid waste dumping fee in Bedford County). It is true that the Legislature has wide discretion in declaring which privileges may be subject to taxation, but "that discretion does not extend to the imposition of a charge, whether a tax or a fee, which is inconsistent with a mandatory general law unless there is a reasonable basis for the discrimination." *Tullahoma,* 938 S.W. 2d at 412. The question then becomes whether or not Polk County ". . . is unique or distinguishable from other counties in any aspect pertinent to the issues in this case. . ." *Id.*

There is no evidence in the record before us showing the required reasonable basis for the particular classification in Chapter Two of the Private Acts of 1981. We find no evidence in the record showing a reasonable basis to treat these specific businesses and their customers in Polk County differently from similar businesses and their customers in other counties of Tennessee. The

Act itself provides no rationale. The Private Act can be upheld against the constitutional challenge under Article XI, Section 8 only if a reasonable basis exists for taxing whitewater rafting activity in Polk County in contravention of the general statutory exemption against such taxation. While the record before us does not show the required reasonable basis, we believe it appropriate to remand this case to the Trial Court to allow the parties to present additional evidence to the Trial Court concerning whether there is a reasonable basis for this classification and a determination by the Trial Court on that issue after consideration of this additional evidence.

Appellant has raised other issues in this appeal. Our holding as discussed above makes it unnecessary to address those other issues at this time.

CONCLUSION

Accordingly, we reverse the Trial Court's judgment against Defendant for taxes due under Chapter Two, Private Acts of 1981 and remand the case to the Trial Court for a determination of whether there is a reasonable basis under Article XI, Section 8 of the Tennessee Constitution for the classification established by the privilege tax assessed in Polk County under the Private Act. The costs on appeal are assessed one-half against the Appellee, Polk County, Tennessee and one-half against Appellant, Glenda B. Rogers, d/b/a Ocoee River Rats..

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D. MICHAEL SWINEY, J.

CONCUR:

_____
HOUSTON M. GODDARD, P.J.

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CHARLES D. SUSANO, JR., J.